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ABSTRACT

This essay presents an examination of how the discipline of business law has developed in recent years, and then develops a model of business ethics. Business ethics is defined as the study of the body of common values and perceptions that inform business decision making and infuse its external environment. A four-part framework is suggested for teaching this model to students in a manner that provides them with a way of addressing and focusing their own interests. The four parts of the framework are: (1) ethical theory; (2) institutional frameworks; (3) organizational cultures; and (4) individual moral choice and responsibility. The kinds of issues and materials that might be used to present each of the four topics to students are suggested. A 24-item list of further readings is included. (DB)

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Teaching Ethics in Business Law Courses

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TEACHING RESOURCES Bulletin NO 2

American Bar Association ABA *Commission on College and University Nonprofessional Legal Studies*

Teaching Ethics in Business Law Courses

by Jeffrey Nesteruk and David Risser

An interesting aspect of teaching ethics in business law courses is revealed in the central problem that underlies the endeavor. The problem is this: While everyone agrees we should be teaching ethics, no one agrees on the exact content of what we should be teaching. For business law professors, ethics has a powerful allure. It is a frequent topic of conversation and the subject of a growing number of articles. A good part of its appeal is due to its rich and multifaceted nature. Ethics, as a field of study, has something for everyone, and this means that each person may take from it something different. The inclusion of ethics in business law courses can convey a false sense of community among professors, who are actually approaching the field in very different ways.

The major pedagogical obstacle facing those of us teaching ethics in a business setting is our failure to adequately define the field. Having failed to arrive at a general conception of business ethics among ourselves, we carry this confusion into the classroom, and from the outset, compromise even our best teaching efforts. Before trying to teach ethics, we need to ask ourselves how the field relates to the law–and having determined that–what it is we should be teaching.

These two questions are closely related. An examination of how the discipline of business law has developed in recent years, can help us to more easily answer the second question, and arrive at a workable conception of business ethics. This is because business ethics is more a continuation and development of what we have been doing in our teaching and scholarship than it is the introduction of an entirely new subject. The concern with business ethics does not represent a movement away from legal concerns, but rather, a deepening of our comprehension of the law.

The place to begin is with a short overview of the development of the discipline of business law. An examination of how the discipline has been progressively redefined will help to reveal a working model of business ethics. Consideration of this model will in turn prompt a reconsideration of our conception of the law itself as a guide in the teaching of business-oriented law courses. Reorienting ourselves in these general and theoretical directions implies looking anew at our daily endeavors in the classroom, and perhaps, being willing to adopt new teaching strategies.

The Development of the Business Law Discipline

What is striking about the development of the business law discipline is that business ethics has emerged as its latest phase. We might profitably ask why this is so.

An article in the Fall 1989 issue of Focus examined the recent history of the business law discipline and recounted how one scholar in particular, Art Wolfe, described its development:

> In the early 1950's, our dominant focus was on the private law rules which facilitated business transactions, such as those of contract. In the mid-1970's, the discipline's focus was broadened to include the public regulatory environment of business. Along with teaching the rules, for instance, of environmental law, many of us began to probe the social policies behind such rules. In the 1980's, yet another orientation is attracting considerable interest. More and more, business law professors are focusing on *ethical* questions. This furthers a transformation in our teaching, away from the notion of law as rules and toward a more complex perspective: law as a body of common values and perceptions.[1]

Insights can often be gained by examining the way in which a discipline progressively redefines itself. In the business law field, such redefinition is not random and has involved more than mere responses to new legal developments, such as the increase in social legislation during the 1960's and 70's. Examining the development of business law can reveal the internal logic of the discipline as each phase of the redefinition, in a somewhat dialectical fashion, both incorporates and transcends the intellectual foundations of the previous phase.

The shift in focus from private law to the public regulatory environment expanded the scope of inquiry for business law professors. We became concerned not only with the rules

covering the interactions between private individuals, but also with the rules defining the complex relationship between citizens and their government. This extended our inquiry beyond a consideration of the human interactions involved in business, more narrowly construed, to the larger political and social environment in which business activity takes place.

While the increasing emphasis on the importance of the public regulatory environment extended the scope of inquiry, it did not fundamentally change the character of the discipline. We were still looking at business law as a set of rules. We simply included the rules applicable to the public sphere along with those applicable in the private sphere which had previously been the sole subject of inquiry. The notion–law as rules–remained our underlying paradigm or model.[2]

The dominance of this notion of law as rules may be due partly to the great influence that actual practitioners had in defining our discipline in its early stages or to the need for our discipline to be made more accessible to non-lawyers. Whatever its origins, this model no longer has an exclusive hold on the approaches taken by business law professors. Perhaps, the most explicit challenge to the rule-oriented conception of the law lies in the emergence of business ethics as a significant focus of concern.

If the shift to a greater emphasis on the public regulatory environment has extended the scope of our inquiry, the focus on business ethics has both deepened it and fundamentally changed its character. Business law is now conceived of less as a collection of "rules" and more as "a body of common values and perceptions." This new conception implies that our inquiry should extend beyond the enactments of legislatures and the pronouncements of courts. We should also examine the pool of values and perceptions which provides the necessary context in which these overtly legal activities take place. Seen in this way, the focus on business ethics allows for a new and broader perspective on the types of questions we have traditionally asked about the legal system.

The importance of scholarly attention to the public regulatory environment has not been abandoned as business law has come to redefine itself and to reflect a strong emphasis on business ethics. The real significance of the emphasis on the public regulatory environment has been its implicit recognition that business activity takes place in a larger political and social context which is important to include in our inquiry if we hope to provide a full understanding of business law. As our discipline has moved forward toward a full engagement with the central issues of business ethics, it has retained its appreciation of the broader political and social environment of business. Business ethics concerns itself not only with the moral dilemmas arising out of individual choices and interaction, but also, with the moral issues that arise when the broader social and political environment of business and the attempts of firms to adapt to and influence this environment are considered.

Model of Business Ethics

As we examine the development of the business law discipline, a model of business ethics begins to emerge. Business ethics is understood as the study of the "body of common values and perceptions" that informs business decision making and infuses its external environment. As we noted above, this view represents both a broadening and a deepening of the traditional field of business law. "Private law rules" are now only part of the subject matter of business law which is increasingly likely to be defined more broadly in terms of the common values and perceptions which constitute the business environment.

This model of business ethics is one which can be used to readily engage students. For students approaching the subject for the first time, there is a strong tendency to see ethics at the periphery or even outside of more traditional business fields, such as finance or marketing. The model of business ethics presented here encourages students to see ethics as a set of concerns which pervades the business world at various points; not as something which stands outside of it. Instead of questioning the relevancy of business ethics, students can be introduced to and, perhaps, intrigued by, its applications.

This model must be presented to students in a manner which provides them with a way of addressing and focusing their own interests. They also need to be shown how to use this model to connect and relate the numerous issues and cases which make up the field.

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There are four parts to the framework we suggest for achieving these goals. Students are introduced to ethical issues in business from the perspectives of *ethical theories, institutional frameworks, organizational cultures,* and *individual moral choice and responsibility.* In addition to providing an approach that complements significant developments in the field of business law, our framework is also compatible with a number of approaches to business ethics already being used in academic and practitioner circles.

First, ethical theory is considered. The class examines the ethical theories which underlie our social ideals and individual values. The focus is on notions, such as rights or the competing theories of utilitarianism and formalism. Second, students are introduced to how such notions and theories manifest themselves in the institutional framework of business. In this regard, three major institutions which are central to the modern business environment are particularly important: laws, markets, and corporations. Third, the class focuses more specifically on this last institution, the corporation, and looks at the cultures spawned by this form of business organization. Students are encouraged to understand how the organizational norms of corporate cultures affect the ethical dimension of decision making by corporations. Finally, the class turns from corporate culture to an examination of the issues surrounding individual moral choice and responsibility. Even though individuals in the corporate hierarchy are restricted by roles and rules, they remain moral agents responsible in important ways for their actions.

Focusing on these four topics also allows us to demonstrate to our students the dynamism of our values and moral perceptions in the business environment; a dynamism which consists of the interplay of ethical theories, institutional frameworks, corporate cultures, and individual choices and responsibility.

Suggested Teaching Strategies

This four part approach to teaching ethics in business law courses provides a useful way of approaching the law from the moral point of view. It situates legal institutions and practices within a wide array of phenomena having normative significance and therefore emphasizes the underlying essence of the law as a "body of common values and perceptions."

In what follows, we will suggest examples of the kinds of issues and materials that might be used to present each of the four broad topics in our approach to students.

1. Ethical Theory

We live in a "rights-conscious" society, and most students already have some understanding of what a right is and what it means for a person to possess one. In addition, the notion of rights is an important element of both ethical theory and of the law, and can be used effectively to introduce students to some of the relationships between ethics and law.

While students may be familiar with the idea of a person possessing a right, they probably have not thought much about the question of what rights a corporation should possess. The particular issue of the right of free speech for corporations, especially as it has taken form in two recent U.S. Supreme Court cases: *National Bank of Boston* v. *Bellotti*[3] and *Austin* v. *Michigan Chamber of Commerce*[4] is a useful one to get students thinking about this and other important questions.

In the majority decision in the *Bellotti* case, the Court struck down a Massachusetts statute which prohibited corporations from making contributions or expenditures advocating a particular position on a question submitted directly to the voters in a referendum. The National Bank of Boston, representing the corporate point of view, argued that this statute was an unconstitutional limitation of a firm's legal right to free speech as protected by the First Amendment. The Court agreed. A majority reasoned that part of the value of free speech in a democracy is that it helps in facilitating the fullest possible dissemination of information and ideas. It was concluded that the Massachusetts law threatened this full dissemination and decided that in this case, the free speech protection of the First Amendment did extend to corporations.

Students can be presented with the facts in the *Bellotti* case, asked how they would decide, and encouraged to defend their decisions. They might then be assigned to read the more important sections of the actual decision in order to compare their reasoning with the Court's. This exercise can provide a forum through which to introduce students to a number of important topics, such as the nature of legal rights or their relationship to moral rights. Discussion of the *Bellotti* case also provides a way to approach several other important issues: What does it mean, in particular, for them to possess the right to free speech? What other legal rights should they possess? What principle or principles should be used for resolving conflicts between the rights of corporations and those of individuals? Can corporations possess moral rights? If so, which ones?

In the more recent *Austin* case, a Michigan law that prohibits corporations from using general treasury funds to support or oppose political candidates was upheld by a majority of the Supreme Court. The statute does outline how separate segregated funds may be used to influence electoral politics. *Austin* involves a different issue than the *Bellotti case*, which involved corporate activity on referendums, but students can gain valuable insights by comparing the legal reasoning in the two cases. Are the decisions in the two cases consistent with each other? If so, how? If not, why not? The Supreme Court has not yet presented us with a single, clear position on the

free speech rights of corporations, but students can be encouraged to speculate about what such a position should look like.

The *Bellotti* and *Austin* cases are also excellent vehicles for exploring significant aspects of what was referred to earlier as the political and social environment of business. Corporations ***are*** powerful participants in the political process. Are they too politically powerful? What about Massachusetts' particular claim, in the *Bellotti* case, that because of their size, visibility, and financial strength, the quality and meaningfulness of individual political participation is threatened by their political activities? If corporate political activity should be limited in some way, how can it be done without violating the rights of either individual members of a firm or of the firm itself? Finally, which institutions (federal courts, state courts, the U.S. Congress, state legislatures) should have primary responsibility in this controversial area?

2. Institutional Frameworks

As indicated above, three major institutions, laws, markets and corporations, deserve consideration when we examine ethical issues from the perspective of institutional frameworks. Here, we suggest an approach for helping students to think about the corporate institution in particular.

The individual human being is the fundamental entity around which the structures of both the law and ethics are built. Corporations are legal actors and are treated as "legal persons" by the law, but they have been assimilated into a legal system designed for individual human beings. For the most part, our legal system does not recognize the organizational realities which make corporations distinctive entities. Recent work by moral philosophers and legal theorists on the nature of complex organizations has produced various competing models of the modern corporation. Three of these models are useful classroom devices for examining such issues as the place of corporations in the law or changes in the legal system which might allow it to treat corporations more adequately.

The ***atomistic model***[5] acknowledges that corporations are composed of individuals, but more importantly, claims that all relevant facts and explanations concerning corporations can be framed in terms of facts and explanations about these individuals. This model, according to which corporations are merely complex and highly structured collections of individual human beings, denies that they can have goals or perform actions which are not ultimately reducible to the goals and actions of individual human beings.

The ***intelligent machine model***[6] also acknowledges that corporations are composed of individuals, but asserts that they have goals and perform actions which cannot be explained solely in terms of the goals and actions of individuals. According to this model, corporations have their own identities which can survive changes in their memberships and may be compared to complex robots possessing artificial intelligence.

The ***moral person model***[7] includes the main features of the intelligent machine model, but, in addition, asserts that corporations are like human beings in morally relevant respects, and thus, should have the same moral rights and responsibilities as human agents.

Students can be asked to decide which model they think is most adequate, and to provide examples of behavior by and within corporations which seem to support one model or another. The models can also be helpful in showing how differing conceptions of corporations as organizations have implications for their treatment in the legal system. For example, the moral person model would seem to support according the full complement of legal rights to corporations, while the implications of accepting the intelligent machine model are less clear on this point, and the atomistic model would make extending legal rights to them rather problematic. Another example involves the proper relationship of stockholders to corporations. The traditional idea that the stockholders own the corporation seems to be supported by the atomistic model, called into question by the intelligent machine model, and directly opposed to the moral person model.

In general, these three models can help business law professors demonstrate to their students how fundamental questions about the nature of corporations as organizations are an important part of a broader examination of the institutional framework in which business activity occurs, and has implications for both law and ethics.

3. Organizational Cultures

We encounter a very broad topic when we turn our attention to corporate cultures. The culture of a corporation consists of all elements, both formal and informal, which, taken together, constitute the particular way of life in that firm and give it a distinctive identity. One way to learn about the culture of a corporation is to examine decision making in the firm, because many elements of its culture will be brought to bear in the process of reaching a corporate decision.

One author suggests that there are actually four stages in the internal decision making process of a corporation: ***perception***, ***reasoning***, ***coordination***, and ***implementation***.[8] In order for a corporation to make decisions that are morally responsible, it must be able to perform well at each of these stages.

At the perception stage, a corporation scans its environment and gathers various sorts of information before acting. A morally responsible corporation will attempt to assess the potential impact that alternative courses of action are likely to have on others.

At the reasoning stage, the corporation takes the morally relevant information gathered in the perception stage and evaluates it in conjunction with its values and norms to reach a decision among the alternatives.

At the coordination stage, the corporation attempts to chart a course of action consistent with both moral and non-moral imperatives. A responsible corporation finds ways to fulfill its moral obligations while meeting non-moral goals, such as profit or a reasonable return on investment.

At the final stage, implementation, a morally responsible corporation will give adequate attention to the means by which its chosen goal is achieved.

These four stages of decision making can serve as a tool for students to use in analyzing corporate decisions. In both business law and business ethics classes there is often substantial attention given to cases, many of which involve descriptions of how a firm has reached a particular decision. Students can identify the stages as they appear in these cases, and will have some basis for comparing cases that facilitates class discussions and individual understanding.

These stages can also be a diagnostic device with which to assess the fitness of a firm's corporate culture as it manifests itself in reaching a decision. Since morally responsible behavior by a corporation depends upon its ability to function well at each stage, dysfunction at any particular stage can make corporate wrongdoing more likely. For instance, during perception, information (much of it morally relevant) is gathered. But, in a corporation that does not possess the departments or other sub-units capable of gathering such morally relevant information, or one in which these departments are under-supported, structurally isolated from other parts of the corporation, or in which lines of communication with them are defective, there is an increased risk that some harm or wrongdoing will occur. Because of a flawed internal decision structure, such a corporation will be unable to perform well at the perception stage. Since its internal decision structure is an important formal element of its culture, the problem indicates that this culture is deficient to some extent.

When we think of the elements of corporate culture, we usually have in mind various explicitly normative features, such as those represented formally by a specific code of corporate ethics or informally by any widely shared, but uncodified, values held by managers and other employees. A focus on the four stages helps to remind us and to show our students that the structural arrangements which embody a corporation's internal decision process also have significant consequences for both the culture of that firm and for the moral and legal integrity of its decisions.

4. Individual Moral Choice and Responsibility

In a society increasingly dominated by large-scale organizations, particularly corporations, the nature and quality of individual moral choice and responsibility in an organizational setting is an essential component of any approach to business ethics. We suggest having students read a chapter-length, fictional case scenario and use this reading as a basis for examining various moral and legal issues that impinge upon individual corporate employees.[9]

The case involves Liberty Oil, a sizable multinational corporation that is facing an environmental crisis arising from a large oil spill by one of its tankers off the coast of California. Along with the environmental crisis, Liberty Oil is threatened with a hostile takeover by a rival firm, Bartles Oil. The company is also involved in a political referendum regarding the construction of a new refinery. These corporate issues are intertwined with the personal dilemmas of a number of characters in the scenario such as the president, members of the board, various vice-presidents, and other employees of the firm.

After reading the case, students can first be asked simply to list all the significant moral and legal issues that they can identify in the context of the Liberty Oil scenario. This is a good place to start, because it is less threatening for students to identify such issues than it is to propose resolutions for them.

The issues which are identified can also be used as devices to help distinguish the legal from the moral, and to demonstrate the deep interrelationship of the two realms. For instance, both morality and the law are action guides, and interact in a number of ways with the process of individual choice in a business setting. But, what are the significant differences between these two important action guides? The law, in particular, can prohibit, require, permit, enable, discourage, complicate, and foster choices. Under what circumstances should the law do each of these things with regard to specific business activities or practices? Why are certain functions for the law regarded as more legitimate than others? And ultimately, why do so many people seem to obey the law so much of the time? The Liberty Oil scenario, or other similar case studies, can be used as a way for students to think in concrete terms about these and other fundamental questions.

One of the most vexing legal questions regarding corporations is who to hold liable when a firm breaks the law. Arrangements exist for holding both individual employees as well as entire corporations liable, and each of the two responses can be applied exclusively or in various combinations with the other. In what kinds of cases should the entire corporation, as an organization, be punished, and when should only individual employees be punished? Are there cases in which both kinds of punishment are appropriate? The oil spill incident in the Liberty case can be used to approach these issues with students. The case reveals that the captain and crew of the wrecked tanker have acted irresponsibly and gives indications that the whole culture of the firm has helped to precipi-

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tate the spill. Liberty's president contends "that the captain and crew of the tanker should be held solely and fully responsible for the spill." He plans to release stories to this effect to the press and admit no corporate responsibility in the matter. First, students can be asked to comment on the legality and ethical soundness of the president's proposed plan. This will lead to broader questions: Who (or what) is responsible for the spill? How should punishment be distributed?

One particularly useful exercise of a more specific nature is to ask students to write a corporate ethical code for Liberty Oil including what they regard as the five most important rules of corporate life. Each rule that is chosen should be explained in terms of how it might improve Liberty's corporate culture in particular and help to resolve the individual moral dilemmas of various characters in this case.

What has been suggested above indicates only a few of the issues that can be introduced by way of this or other sufficiently rich case studies. From a teacher's point of view, the value of using such cases, whether actual or fictional, is that it allows students to think about and discuss theoretical, legal and moral issues involved in understanding individual moral choice and responsibility in terms of specific instances and concrete characters, both human and corporate.

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NOTES

[1]Jeffrey Nesteruk, "Teaching Business Law in the 1990s," *Focus on Law Studies*, vol. V, no. 1 (Fall 1989) 2, 12.

[2]For this perspective, we would like to thank Tracy Dobson, Steven B. Dow, and Arthur Wolfe.

[3]*National Bank of Boston* v. *Bellotti* 435 U.S. 765 (1978).

[4]*Austin* v. *Michigan Chamber of Commerce* 110 S. Ct. 1391 (1989).

[5]Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society*. (Berkeley: University of California Press, 1986), See especially Chs. 1 & 2.

[6]*Ibid.*, Chapters 1, 2 & 3. See also John Ladd, "Morality and the Ideal of Rationality in Formal Organizations," 56 *Monist* 488 (1970).

[7]*Ibid.*, Chapters 1, 2 & 3. See also, Peter A. French, "The Corporation as a Moral Person," 16 *American Philosophical Quarterly* 207 (1979).

[8]Kenneth Goodpaster, "The Concept of Corporate Responsibility," in *Just Business: New Introductory Essays in Business Ethics*, Tom Regan, ed. (Philadelphia: Temple University Press, 1983), pp. 292-322.

[9]The scenario we suggest using is Chapter 1 in Peter A. French, Jeffrey Nesteruk, and David T. Risser, *Corporations in the Moral Community* (Fort Worth: Holt, Rinehart, and Winston), 1992.

SUGGESTIONS FOR FURTHER READING

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1) *Austin* v. *Michigan Chamber of Commerce* 110 S. Ct. 1391 (1989).

2) *National Bank of Boston* v. *Bellotti* 435 U.S. 765 (1978).

General Reading

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